STATE OF MICHIGAN

COURT OF APPEALS

In re ROBERT M. STUCKEY AND BERNICE G. STUCKEY REVOCABLE TRUST.

CHARLES H. MIEL, successor trustee of the ROBERT M. STUCKEY AND BERNICE G. STUCKEY REVOCABLE TRUST,

Appellee,

v

PATRICIA S. WYBENGA,

Appellant.

UNPUBLISHED
June 17, 2021

No. 354190
Montcalm Probate Court
LC No. 2018-033079-TV

Before: BOONSTRA, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Appellant Patricia S. Wybenga (Patricia)[1] appeals by right the probate court's order authorizing the successor trustee of the Robert M. Stuckey and Bernice G. Stuckey Revocable Trust (the Trust), Charles H. Miel (Miel), to sell a portion of the Trust's real estate to Robert A. Stuckey (Robert).[2] We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Robert M. and Bernice G. Stuckey (Bernice) were married and had seven children: Sandra J. Stuckey (Sandra), Sharon G. Fowler (Sharon), Judith N. Stuckey (Judith), Gregory W. Stuckey

[1] Because several of the beneficiaries of the trust have the same surname, we will refer to all beneficiaries by their first names.

[2] For ease of reference, we will refer to Robert A. Stuckey as Robert, and to Robert M. Stuckey as Robert M.

(Gregory), Jane S. Kerr (Jane), Patricia, and Robert. Robert M. and Bernice executed a revocable trust in July 2000, and appointed Robert and Patricia to be successor co-trustees. Bernice died in August 2000, and Robert M. died in February 2011. After their parents' deaths, Robert and Patricia began administering the Trust, but frequently they could not agree on how to manage trust assets. The primary assets of the Trust were real estate parcels.

In October 2018, Robert petitioned the probate court to supervise the Trust to the extent necessary to resolve the conflict between the co-trustees. In response to the petition, Patricia agreed that the primary assets remaining to be distributed were real property parcels and that she and Robert had been unable to agree on their sale; she further agreed that the probate court should supervise the Trust's administration. The response asked the probate court to order that the real property be listed with a broker with terms agreed upon in advance. The response also sought to have the trial court "Order the performance of the contract unilaterally entered into by Co-Trustee Robert A. Stuckey with the Trust property neighbor regarding a septic issue" or otherwise "resolve this outstanding contract and real estate issue." Attached as an exhibit to Patricia's response was a letter from Robert to Darlene Schilling (Schilling), dated December 13, 2011. In the letter, Robert wrote that the Trust "would like to offer to you for sale the 100' x 100' piece of land to the south of your mother's property in the South Shore Plat" for $6,000. He wrote that it was a condition of the purchase that Schilling pay for the boundary survey and any revisions to the plat that may be necessary. The letter suggested that Robert knew that Schilling wanted to purchase the property for the installation of a septic system for her neighboring property. However, he wrote that Schilling could not begin construction of the septic system before the "agreement" was in place.[3]

The probate court held a hearing on the petition in November 2018, and entered an order concerning the continued administration of the Trust on December 6, 2018. The probate court ordered Robert and Patricia to list all the parcels with a realtor within 28 days and ordered the sale of the property for as near as possible to twice the state equalized value. The court did not specifically address the issue of the agreement with Schilling.

In July 2019, Patricia petitioned the probate court for instructions, alleging that the Trust had entered into a listing agreement for the 22 parcels still owned by the Trust with a realtor, Richard Adgate (Adgate). Adgate had sold four properties for $64,200, and the remainder had offers that the Trust had not yet accepted. More specifically, Patricia alleged that she and her husband had offered to purchase the parcels that were known as the "Rocky Field Farm" for $210,000, but that Robert had refused to allow the Trust to accept the offer.

Patricia also stated in her petition that Schilling was unhappy with the purchase of the 100-by-100-foot parcel for which she had paid $6,000. The parcel was apparently too small to legally construct a septic system on the property, and Schilling was purportedly threatening to sue for the return of her $6,000. The petition alleged that Schilling had offered to purchase a full acre of land

[3] Patricia's response did not clarify precisely what the dispute was concerning the property sold to Schilling, or what sort of performance she sought; she did elaborate somewhat in her petition for instruction in 2019.

for her septic system for $10,000, as long as she received credit for the $6,000 already paid, but this offer remained unaccepted by the Trust. The petition asked the probate court to instruct the co-trustees regarding sale of any unsold real estate owned by the Trust.[4]

In July 2019, the probate court entered an order compelling Robert and Patricia to agree on terms of sale for the remaining parcels within 60 days. The court ordered that if they could not agree, it would remove them as trustees. Robert and Patricia were unable to agree on the terms of the sale; and so, on October 11, 2019, the probate court removed them as trustees and appointed Miel, a retired judge, to serve as the sole trustee.

In May 2020, Miel petitioned the probate court for authority to sell the Trust's real estate. The petition stated that six parcels had been listed for sale and had not sold in more than $1^1/_2$ years; accordingly, Miel asked for permission to reduce the prices. The petition also stated that Sharon and Sandra had offered to purchase the parcel designated as "Parcel C" of Rocky Field Farm for $40,000, and that Robert and Judith had offered to purchase "Parcel A" of Rocky Field Farm for $22,375. Miel asked for approval of those sales.

Patricia contested the petition, stating that she had made an offer to purchase Parcel A for $30,000, which was rejected by Miel without a counteroffer or explanation. She also stated that she had a unique need for the property because she owned neighboring property and Parcel A was necessary for her to be able to put in a septic system. Patricia alleged that Miel was acting to benefit some trust beneficiaries at the expense of others. Specifically, she alleged that it was improper to allow Miel to sell Parcel A to Robert and Judith for $22,375 when her offer would yield $7,000 of additional revenue to the Trust. She alleged that Miel had breached his fiduciary duty to the Trust's beneficiaries, that Miel and Adgate were involved in bad faith dealings, and that she was being "shut out of having equal rights to purchase Trust real estate." She asked the probate court to order Miel to accept her higher offer for Parcel A.

The probate court held a hearing to consider Miel's petition on June 9, 2020. Because of the ongoing COVID-19 pandemic, the court held the hearing using videoconferencing technology. At the hearing, the parties agreed that there was no objection to Miel's requests to sell the majority of Trust property; the only objection involved Patricia's objection to the proposed sale of Parcel A to Robert and Judith. Miel testified that he had rejected the offer by Patricia and her husband for Parcel A for two reasons: first, Robert and Judith's offer had been made, and accepted, before Patricia's offer of $30,000; and second, Patricia's offer was not as beneficial to the estate as the offer by Robert and Judith.

Miel elaborated that Patricia had expressed interest in purchasing Parcel A via email in early April 2020, but had not submitted a formal offer to purchase the property at the time Robert and Judith made their offer. After Miel told her that he required a formal offer, Patricia submitted an offer that was ambiguous in several ways—for example, portions of the offer stated that the buyers were offering to pay a portion of the outstanding property taxes, while another portion

[4] Reading this petition together with Patricia's earlier response, it appears that she sought to have the court order Robert to accept Schilling's offer to purchase one acre of land, make a counteroffer, or otherwise resolve Schilling's concerns.

stated that they were not. Miel testified that the offer "was so bad we couldn't tell what she wanted to do and we just rejected it." Miel further testified that he rejected a subsequent "counter-offer" from Patricia because "a counter offer to a rejected offer is not possible." Miel subsequently received the formal offer at issue on May 17, 2020, after Robert and Judith's offer had been accepted on April 27, 2020. Regarding the financial benefit to the trust from the two offers, Miel testified that Robert and Judith had offered to purchase Parcel A for $22,275. They also agreed to pay $1,000 of the closing costs; and there would be no brokerage fee involved, which would save the Trust $1,566. Miel stated that the net profit to the Trust would be $24,921. By contrast, Patricia and her husband had offered to pay $30,000, but stated as a condition of the sale:

> Buyers agree after closing to sell Darlene Schilling a minimum of a one acre [sic] parcel to satisfy the estate's [sic] responsibilities. Upon acceptance of the purchase agreement of the parcel with Darlene Shelling [sic] and Buyers, the trust will release to the title company $6000 currently being held in escrow to be applied to Darlene Shilling's [sic] good faith deposit.[5]

Miel stated that his review of the Trust finances had revealed no escrowed funds; further, Miel testified that although the matter with Schilling had occurred before he became trustee, it was his understanding that Schilling had paid $6,000 for property and that the funds had been put into the Trust's checking account and distributed.[6] Patricia also did not agree to pay survey costs or prorate taxes. When adjusted for these amounts, the net to the Trust under Patricia's offer was $22,118, which was $2,000 less than Robert's offer.

On cross-examination, Miel agreed that he had to treat the beneficiaries equally under the Michigan Trust Code, but opined that when two beneficiaries are interested in the same property "[s]omebody [was] going to lose." He further stated that he felt that every beneficiary had been given an equal opportunity to purchase Parcel A, and denied that he had intended to simply take the first offer that he received. He asserted that he only refused Patricia's various offers because there was something wrong with each offer.

After hearing the evidence and arguments, the probate court stated that there appeared to be agreement on the request for authority to sell Parcels 1 through 6. There was also no objection to the terms for Parcel C; accordingly, the court would authorize those sales. The court also authorized the sale of Parcel A to Robert and Judith, finding that Patricia had been given notice of Robert's offer and the opportunity to make her own offer, but that her offer provided less benefit to the Trust than Robert and Judith's offer.

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[5] In other words, Patricia and her husband planned to sell a portion of the land they purchased from the Trust to Schilling, with the $6,000 Schilling had already paid being "applied" to the purchase, i.e., distributed to Patricia and her husband as the sellers in that transaction.

[6] At the hearing, Patricia's counsel stated that Miel's testimony was "the first that . . . I've heard about this credit for $6000."

On June 23, 2020, the probate court entered an order authorizing Miel to perform the sales and list the properties as described in his petition. This appeal followed.

II. APPROVAL OF SALE OF PARCEL A

Patricia argues that the probate court erred in several respects when it approved Miel's petition for authority to sell Parcel A to Robert and Judith. We disagree. This Court reviews de novo whether the probate court properly interpreted and applied the relevant statutes and court rules. *Franks v Franks*, 330 Mich App 69, 86; 944 NW2d 388 (2019). This Court reviews the findings underlying a probate court's application of law for clear error. See *In re Gerstler Guardianship*, 324 Mich App 494, 507; 922 NW2d 168 (2018). A finding is clearly erroneous when, although there might be evidence to support it, this Court's review of the entire record has left the Court with the definite and firm conviction that the probate court erred. See *Reed Estate v Reed*, 293 Mich App 168, 173-174; 810 NW2d 284 (2011). This Court reviews a probate court's exercise of discretion for an abuse of discretion. See *In re Redd Guardianship*, 321 Mich App 398, 403; 909 NW2d 289 (2017). A probate court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id*.

As a preliminary matter, we note that some of the matters Patricia has asked this Court to review are not properly before us. For example, she asks this Court to remove Miel as the trustee and order that he be provided no compensation. Patricia did not petition the probate court for Miel's removal and has not challenged his compensation in the probate court. Patricia has therefore waived appellate review of this issue. See *Walters v Nadell*, 481 Mich App 377, 387; 751 NW2d 431 (2008); *Bailey v Schaaf (On Remand)*, 304 Mich App 324, 344; 852 NW2d 180 (2014), vacated not in relevant part 497 Mich 927 (2014). Accordingly, we have limited our analysis to Patricia's claims of error involving the probate court's handling of the hearing on Miel's petition for authority to sell and the court's order granting the petition.

A trustee has the power conferred by the terms of the trust, and a trustee does not ordinarily require authorization from a probate court to exercise his or her powers. See MCL 700.7816(1)(a); see also *In re Robert H Draves Trust*, 298 Mich App 745, 762; 828 NW2d 83 (2012) (stating that trusts are by default unsupervised under Michigan law). The Trust in this case authorized the trustee to "sell, exchange, assign, transfer and convey any security or property, real or personal held in trust, at public or private sale, at such time and price and upon such terms and conditions (including credit) as it may determine, and grant options to purchase or acquire any trust property." As such, the trustee had broad discretion to sell the Trust's real property without the probate court's permission. See MCL 700.7816(1)(a); see also MCL 700.7817(y). However, because Robert and Patricia could not agree on the terms for the sale of the Trust's real property, Robert invoked the probate court's supervisory authority. See MCL 700.7201(1).

Even after invoking the probate court's jurisdiction, the trustee had the power to act without court permission, except as provided by court order or other law. See MCL 700.7201(2). Robert asked the probate court to resolve the dispute that he had with Patricia concerning the disposition of the Trust's real property, and the probate court entered an order governing the sale of the Trust's real property. Thereafter, Miel asked the probate court to authorize the sale of the real property on terms that he identified in his petition. In considering Miel's petition, the probate court was required to review Miel's request to determine if it was within Miel's discretion as trustee and was

not made in bad faith or in circumstances amounting to unfair dealings or a conflict of interest. See *In re Harold S Ansell Family Trust*, 224 Mich App 745, 749; 569 NW2d 914 (1997) (stating that whether to sell trust assets on particular terms is a matter committed to the trustee's discretion and that this Court reviews a probate court's review of the trustee's decision to determine whether it clearly erred when it found that the trustee did not abuse his or her discretion).

Patricia argues that Miel was partial and acted against Patricia's interests. Specifically, she claims that he had a duty to establish criteria for conducting the sale, which included establishing a deadline for making offers. She also claims that Miel was required to specifically inform her of any defects in her offer so that she could modify her offer. The law and record, however, do not support Patricia's position.

Miel was required to act in the best interests of all the beneficiaries—he could not favor one beneficiary at the expense of the other beneficiaries. See MCL 700.7802(1); see also MCL 700.1506. Miel also had a duty to manage the Trust's assets as a "prudent person" would do when dealing with the "property of another, including following the standards of the Michigan prudent investor rule." MCL 700.7803.

Although Patricia would have preferred that Miel set a procedure for handling offers—including a deadline—and would have liked additional information about his reasons for rejecting her offers, Miel's failure to set such procedures or provide her with a specific basis for rejecting her offers did not amount to acts of bad faith, unfair dealing, or constitute a conflict of interest. See *In re Harold S Ansell Family Trust*, 224 Mich App at 749. Miel was not obligated by the law or the probate court's order to set a deadline for receiving offers on the property or give Patricia a specific reason for his decision to reject her offer. Miel only had to keep Patricia "reasonably informed about the administration of the trust and of the material facts necessary" for her to protect her interests. MCL 700.7814(1).

The record showed that Miel provided Patricia with notice of his intent to sell Parcel A, and gave her a copy of the offer that he had received from Robert and Judith. The provision of that information satisfied Miel's duty to keep Patricia reasonably informed about the administration of the Trust and to submit her own offer to protect her interests if she desired. Moreover, Miel asked the probate court to authorize the sale after a hearing and notified all the interested persons about the hearing. Under these circumstances, it cannot be said that Miel breached his duty to keep Patricia informed or that he otherwise failed to treat Patricia impartially. See *In re Harold S Ansell Family Trust*, 224 Mich App at 749, 751 (holding that a trustee complied with the duty to keep the beneficiary informed by notifying the beneficiary of his intent to sell the real property and advising the beneficiary about the progress of the sale).

Regarding Miel's acceptance of Robert and Judith's offer over Patricia's, the probate court did not err by holding that Miel had adequately justified his decision in terms of financial benefit to the Trust. In considering the offers, Miel had to act as a reasonably prudent person would act. MCL 700.7803; MCL 700.1502(1). To that end, Miel had to exercise "reasonable care, skill, and caution" and had to consider all the "circumstances of the fiduciary estate" when considering the offers. MCL 700.1502(1). Miel could not view the offers in isolation; he had to consider the offers in context and while considering the overall benefit to the Trust and the Trust's beneficiaries. See MCL 700.1503(1); MCL 700.1503(2). Contrary to Patricia's argument, Miel could not simply

look at the face value of the offers and conclude that the offer with the higher face value was the better offer. He had to consider the terms of the offers as a whole to determine which offer better served the interests of the Trust and its beneficiaries. See MCL 700.1503(1). Considering the complete terms of both offers, Miel's decision to reject Patricia's offer in favor of the offer made by Robert and Judith was not an abuse of discretion. See *In re Green Charitable Trust*, 172 Mich App 298, 313; 431 NW2d 492 (1988); see also *In re Redd Guardianship*, 321 Mich App at 403.

Robert and Judith offered to purchase Parcel A for $23,275. They also offered to pay $1,000 of the closing costs associated with the sale. Miel noted that the sale to Robert and Judith would also save the Trust the expense of a brokerage fee. Miel opined that the net benefit to the Trust of that offer was nearly $25,000.[7] Patricia, by contrast, offered to purchase Parcel A for $30,000, i.e., at a higher purchase price. However, Patricia included terms in her offer that significantly diminished its value. Most notably, her offer included the Trust entering into an agreement to pay her $6,000 dollars when she sold property to Schilling. This paragraph plainly imposed duties on the Trust that reduced the value of the offer to the Trust. Although Patricia labeled the required transfer of money a "release" to the title company and not a payment to her and her husband, the context clearly shows that the funds "released" to the title company would ultimately be paid to Patricia and her husband. Regardless of whether these funds were held in escrow—and Miel testified that they were not—this transfer would ultimately benefit Patricia and her husband. Neither Miel nor the probate court erred when they interpreted this provision as requiring the Trust to transfer $6,000 to Patricia and her husband as part of the deal. Further, Miel testified that Patricia's offer did not include payment of certain closing costs and taxes. Accordingly, when considered as a whole, the probate court's and Miel's determination that Patricia's offer would result in less of a benefit to the Trust and its beneficiaries was not in error.

Notwithstanding the above, Patricia argues that the transfer did not diminish the value of her offer because the "release" of $6,000 would benefit the Trust by settling a dispute with Schilling, avoiding potential future litigation. Miel was not required to consider such speculation; the offer by its terms did not purport to settle any of Schilling's potential claims or release the Trust from liability. Further, Miel alone had the power to perform, compromise, or refuse to perform any agreement involving Schilling. See MCL 700.7817(d).[8]

Even if there were a bona fide dispute with Schilling, Miel could reasonably determine that the Trust might settle any dispute with Schilling with additional benefits to the Trust or for less

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[7] Patricia argues that the "net" to the Trust cannot possibly be higher than the face value of the offer. Examined in context, it is clear that Miel's statement did not refer to an actual transfer of funds to the Trust greater than the purchase price of the offer; rather, he used the term "net" to refer generally to the financial benefit to the Trust arising from the offer. Further, Miel clarified that he arrived at the "net" figure by considering the purchase price plus the portion of the closing costs Robert and Judith agreed to pay and the savings that would be realized by avoiding a brokerage fee. Miel's use of the term "net" does not require reversal.

[8] Miel testified that, when he first became trustee, Patricia told him that Schilling did not have a valid claim, and that Robert told him that he would satisfy Schilling's claim; for that reason, Miel opined that there was no dispute that needed to be settled.

cost to the Trust, and without the needless complications arising from including the terms of the settlement in an unrelated real estate transaction. Taking the totality of the circumstances into consideration, Miel could reasonably conclude that there was no need to pay or return $6,000 to Schilling. Consequently, acting in the exercise of sound business judgment, see *In re Green Charitable Trust*, 172 Mich App at 313, Miel could conclude that the value of the offer by Patricia and her husband involved substantially less benefit to the Trust.

Patricia also complains that the probate court and Miel misapplied the prudent-investor rule by failing to consider her special need for Parcel A. More specifically, she argues that she owns land that neighbored Parcel A and needs Parcel A in order to develop the land that she already owns. We disagree. When considering the investment or management of the Trust's assets, Miel had to consider a variety of factors. See MCL 700.1503(2). One of the factors that he was required to consider was the "asset's special relationship or special value, if any, to the purposes of the fiduciary estate or to 1 or more of the beneficiaries." MCL 700.1503(2)(h). In interpreting similarly worded provisions,[9] other jurisdictions have recognized that this language requires a trustee to consider whether an asset has special value as an heirloom, a prized asset, or a holding that is important to retain in the family. See *Glass v SunTrust Bank*, 523 SW3d 61, 74-75 (Tenn App, 2016) (recognizing that the official comments refer to the special preferences of the beneficiaries respecting heirlooms or other prized assets); *In re Trust Created By Inman*, 269 Neb 376, 384; 693 NW2d 514 (2005) (holding that a trustee did not have an absolute duty to diversify the assets because the prudent-investor rule required the trustee to consider the special value of the asset to the trust or beneficiaries and there was evidence that the farmland had sentimental value to the beneficiaries); *Wood v US Bank, NA*, 160 Ohio App 3d 831, 841; 828 NE2d 1072 (2005) (stating that similar language refers to holdings that are important to the trust or family).

The record does not establish that Parcel A had any sentimental or special value to the Trust or beneficiaries as a whole; indeed, the record shows that the beneficiaries generally agreed that Parcel A should be sold. Rather, Patricia argues that the property was needed to establish a septic system for her property. Although Patricia asserted that she had a greater need for the property than Robert or Judith, her special need as a beneficiary was but one factor among many that Miel had to consider when determining whether to sell Parcel A. See MCL 700.1503(2) (identifying numerous circumstances that a fiduciary must consider, among other factors left unstated). And the prudent-investor rule did not require Miel to give Patricia's preferences dispositive weight. Rather, Miel had to consider the differing interests of the remaining beneficiaries, see MCL 700.1507, when determining what was in the best interests of the beneficiaries as a whole, see MCL 700.1506.

[9] Our Legislature modeled the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., on the Uniform Probate Code. See *In re Jajuga Estate*, 312 Mich App 706, 712 n 2; 881 NW2d 487 (2015). Because our Legislature provided that EPIC must be construed liberally to—in relevant part—promote uniformity of law with other jurisdictions, this Court may rely on foreign authorities as persuasive authority for the proper interpretation of our law. *Id*. at 723 n 7.

The record shows that Miel adequately considered Patricia's offer under this framework. Miel took into consideration Patricia's circumstances and determined that her circumstances did not warrant selling the property subject to terms that were less beneficial to the other beneficiaries. On the record before this Court, there is no basis for concluding that Miel violated the prudent-investor rule when he determined that it was in the Trust's best interests to accept the offer by Robert and Judith rather than the offer by Patricia and her husband. See MCL 700.1503(2); MCL 700.1506; MCL 700.1507.

Patricia also complains generally that Miel, Adgate, and Miel's lawyer were biased and failed to meet the duties imposed under MCL 700.1510. Patricia's claims about Adgate and Miel's lawyer are irrelevant to her claims on appeal; there was no evidence that Adgate or Miel's lawyer had been delegated an investment or management function within the meaning of MCL 700.1510(1), which would require them to exercise "reasonable care" to comply with the terms of the delegation under MCL 700.1510(3). Rather, whatever obligations they might have had as agents of the Trust were obligations that they owed to the Trust itself. In any event, there was no evidence that Adgate or Miel's lawyer acted without reasonable care in handling their respective obligations as a real-estate agent and lawyer.

Similarly, Patricia has not established that Miel acted in violation of his duty to treat the beneficiaries impartially. Again, Miel properly identified deficiencies in Patricia's offer and reasonably concluded that the beneficiaries as a whole would be better off by accepting the offer by Robert and Judith. There was no record evidence that Miel's decision amounted to anything other than a good faith weighing of the benefits and deficiencies involved in the competing offers. Moreover, as already stated, the record demonstrated that Miel adequately informed Patricia about the sale of the real estate and that Patricia had ample time to craft an appropriate offer.

The probate court did not clearly err when it found that Miel's decision to accept the offer by Robert and Judith, and to reject the offer by Patricia and her husband, fell within the range of reasonable and principled outcomes. See *In re Green Charitable Trust*, 172 Mich App at 313. The probate court therefore did not err when it approved Miel's request for authorization to sell Parcel A to Robert and Judith on the terms identified in the petition. *Id.*

III. DUE PROCESS

Patricia also argues that the probate court's decision to use videoconferencing technology to hold the hearing on Miel's petition violated due process, citing Supreme Court Administrative Order No. 2020-6, and the Michigan court rules.[10] We disagree. This Court reviews de novo whether the trial court's procedures met the requirements of due process. See *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277-278; 831 NW2d 204 (2013). This Court also reviews de novo, as a question of law, the proper interpretation and application of an administrative order. See, e.g., *Aguirre v Dep't of Corrections*, 307 Mich App 315, 320; 859 NW2d 267 (2014) (stating that this Court reviews de novo the proper interpretation of an executive order). Finally, this Court

[10] Patricia did not raise her due process challenge in the probate court. Therefore, her claim is unpreserved. However, we choose to exercise our discretion to review this claim as a matter of law that does not require development of the record. See *Bailey*, 304 Mich App at 344-346.

"reviews de novo whether the trial court properly interpreted and applied the relevant statutes and court rules." *Franks*, 330 Mich App at 86.

Both the Constitution of the United States and the Michigan Constitution protect persons being deprived of life, liberty, or property without due process of law. See US Const, Am XIV; Const 1963, art 1, § 17. Because the probate court's hearing involved civil proceedings, the probate court did not have to ensure that Patricia had the benefit of all the safeguards afforded to an accused in a criminal proceeding. See *Porter v Porter*, 285 Mich App 450, 456-457; 776 NW2d 377 (2009). But, at a minimum, due process requires that a person be afforded notice and the opportunity to be heard at a meaningful time and in a meaningful manner before being deprived of life, liberty, or property. See *Bonner v Brighton*, 495 Mich 209, 235; 848 NW2d 380 (2014). When identifying whether due process requires additional safeguards, courts examine several factors: (1) the private interests affected by the official action; (2) the risk that the procedures will result in the erroneous deprivation of the private interest; (3) the probative value of the additional procedural safeguards; and (4) the Government's interest, including the function involved and the fiscal and administrative burdens that the substitute procedures would entail. *Id*.

Because the requirements of due process depend in part on the nature of the private interest with which the government has interfered, a due process analysis begins with identification of the liberty or property interest at stake. See *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004). Persons generally have a liberty interest in the freedom to contract, which is protected by the Fourteenth Amendment; as such, due process may prevent the government from directly interfering in the exercise of that right. In this case, the right at issue in the hearing was a trust beneficiary's right to have the trial court review a decision made in the ordinary course of administering a trust. Moreover, because a beneficiary has recourse to the courts to correct violations of the prudent-investor rule, see MCL 700.7901, the risks associated with the trial court's review of a particular exercise of discretion were limited. Accordingly, under the totality of the circumstances, we conclude that the due process protections to which Patricia was entitled were those generally associated with civil litigation, i.e. notice and a meaningful opportunity to be heard. See *Bonner*, 495 Mich at 235.

The record demonstrates that Patricia had notice of the hearing and had a meaningful opportunity to participate. The probate court held the hearing through videoconferencing technology, which it was permitted to do, see MCR 5.140(A); Administrative Order No. 2020-6, ___ Mich ___ (2020), and Patricia appeared at the hearing and was represented by counsel. The probate court afforded Patricia's counsel the opportunity to cross-examine Miel about his decision to accept the offer by Robert and Judith and to reject the offer by Patricia and her husband. Counsel also had the opportunity to present evidence, such as Patricia's offer. It was evident too that the probate court had a copy of the offer, and the probate court read the disputed provision into the record. After Patricia's counsel indicated that he had no further questions for Miel, the probate court also provided Patricia with the opportunity to present her own argument after her lawyer rested his case. The probate court only interrupted Patricia to prevent her from discussing facts that were not in evidence, which was appropriate for the court to do. See, e.g., *Harvey v Security Servs, Inc*, 148 Mich App 260, 268-269; 384 NW2d 414 (1986) (recognizing that counsel improperly argued facts that were not in evidence, but determining that the remarks did not deprive the opposing party of a fair trial).

It was also clear that the probate court had all the evidence that it needed to evaluate Miel's exercise of discretion. The decision at issue involved whether Miel's decision to accept the offer by Robert and Judith over the offer by Patricia and her husband fell within the range of reasonable and principled outcomes. See *In re Green Charitable Trust*, 172 Mich App at 313. To make that determination, the probate court only needed to examine the competing offers and hear Miel's reasons for rejecting the one over the other. The court had all the evidence that it needed to evaluate the offers and Miel's reasons for exercising his discretion. The record further showed that the probate court made its decision on the merits of that evidence. Therefore, it was evident that Patricia had a meaningful opportunity to be heard, which met the minimum requirements of due process guaranteed under the constitutions. See *Bonner*, 495 Mich at 235.

Patricia nevertheless complains that the probate court's use of videoconferencing deprived her of a meaningful opportunity to cross-examine Miel and present evidence because she was unable to communicate the information that she had to her lawyer during Miel's cross-examination.

As one court has observed, hearings held by videoconferencing have several limitations: the use of video may make it difficult for the trier of fact to gauge demeanor and make credibility determinations; and it may make it difficult for a party to interact with his or her lawyer. See *Rusu v US Immigration and Naturalization Serv*, 296 F3d 316, 322-323 (CA 4, 2002).[11] However, these problems do not invariably require the conclusion that the hearing was unfair. *Id*. at 324. In other words, the mere fact that there were challenges accompanying the hearing because it was held through videoconferencing technology did not establish that Patricia did not have a meaningful opportunity to be heard despite the limitations.

The record shows that Patricia retained her own lawyer, and nothing appears to have prevented Patricia from meeting with her lawyer to prepare for the hearing. She could have discussed the evidence she wished to have admitted, and her lawyer could have prepared the evidence in advance and provided copies to the court and other parties to facilitate admission at the hearing. Patricia could also have elected to participate in the hearing from the same location as her lawyer to alleviate the difficulties that were inherent in participation from different remote locations. She could also have arranged to communicate privately with her lawyer through a different channel, through a digital messaging service, or by phone. The probate court's procedures did not preclude any of these options. Self-inflicted problems do not establish a due process violation. *Id*. We conclude that the probate court's procedures provided Patricia with notice and an opportunity to be heard in a meaningful manner; due process required nothing more. See *Bonner*, 495 Mich at 235.

Patricia also complains that the probate court's procedures did not comply with Supreme Court Administrative Order No. 2020-6. We disagree. The administrative order authorizes the use of videoconferencing technology to conduct court proceedings remotely during the pandemic, but only if the court's procedures are consistent with a party's constitutional rights and the

[11] Although decisions of lower federal courts are not binding on this Court, they may be persuasive. See *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

procedures "enable confidential communication between a party and the party's counsel." Again, the record demonstrates that Patricia had notice and a meaningful opportunity to be heard.

As for the requirement of enabling confidential communication, in the context of the Supreme Court's order, the most reasonable construction is that the Supreme Court required courts using videoconferencing technology to provide the "opportunity" for a party to communicate confidentially or "to make feasible or possible" the ability to communicate confidentially. See *The American Heritage College Dictionary* (3d ed). There was no evidence that the videoconferencing procedure prevented Patricia from having confidential communications with her lawyer. As explained, there were several ways in which Patricia could have had confidential communications with her lawyer during the hearing; moreover, the record is devoid of any evidence that confidential communication between Patricia and her counsel was limited or denied. She chose not to employ any of those methods, and the probate court's procedures cannot be faulted for her decision.

Patricia also argues that the probate court's use of videoconferencing prevented her attorney from conducting a full cross-examination of Miel, as required under MCR 2.407(C)(4). We disagree. MCR 2.407(C)(4) provides that videoconferencing technology must provide for "full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits." There is no evidence on the record that suggests that Patricia's counsel was hampered in his ability to conduct Miel's cross-examination, or that he was unable to present any exhibits or other documents, other than documents that were inadmissible. Further, despite her argument that videoconferencing technology prevented her from speaking, the record shows that Patricia in fact interjected during her counsel's closing argument, asked to make a statement, and was allowed to do so. The hearing involved a review of Miel's decision to accept one offer over another offer.

The probate court's use of videoconferencing technology to conduct the hearing did not violate due process. The probate court also did not violate AO 2020-6 or MCR 2.407(C) by electing to conduct the hearing through videoconferencing.

IV. JUDICIAL BIAS

Patricia also argues that the probate court was biased against her.[12] Whether a court engaged in misconduct that deprived a litigant of a fair hearing is a question of law, which this Court reviews de novo. See *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015).

Due process requires the decisionmaker who presides over a hearing to be impartial and unbiased. See *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). This Court presumes a trial court to be fair and impartial, and a party bears a heavy burden to prove otherwise. See *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002). To

[12] Patricia did not preserve this claim of error in the trial court. See *Meagher v Wayne State Univ*, 222 Mich App 700, 726; 565 NW2d 401 (1997). Nevertheless, in the interests of finality, we address it. See *Bailey*, 304 Mich App at 344-346.

demonstrate bias or prejudice that warrants relief, a party must show that the court had a deep-seated favoritism or antagonism that made fair judgment impossible. See *Cain*, 451 Mich at 496.

Patricia argues that the probate court lacked knowledge of the law, did not understand the nature of the hearing, and erred in several respects. As discussed, we have found no significant errors in the probate court's findings or its application of the law. In any event, mere adverse rulings, even if erroneous, do not establish bias or misconduct sufficient to constitute a denial of due process. See *In re Susser Estate*, 254 Mich App at 237.

Patricia also argues that the probate judge displayed bias when he interrupted her and prevented her from arguing her case. The record does not support her argument. The judge gave Patricia an opportunity to argue her case even though she was represented by counsel, and only interjected to remind her that she was not permitted to refer to facts not in evidence when giving a closing argument. In fact, the judge apologized for interrupting. The judge correctly prevented Patricia from arguing facts that were not in evidence. See *Harvey*, 148 Mich App at 268-269. Moreover, given that her lawyer had already presented her case and arguments, the judge could reasonably choose to limit Patricia's remarks in the interest of judicial economy. See MCR 2.507(F). We see no evidence of bias or misconduct in the probate judge's conduct during her statement.

Patricia also argues that the judge showed his bias toward her by questioning her counsel during Miel's cross-examination. We disagree. Patricia's counsel asked Miel about whether he informed Patricia about the basis for his decision to deny her offer, and Miel answered that he did not remember. The judge then asked Patricia's counsel whether it was counsel's position that the law required Miel "to explain why each and every offer was rejected specifically?" Counsel responded that that was Patricia's position. The judge also asked whether it was counsel's position that Miel had a continuing duty to evaluate any and all offers that came in after he had already accepted an offer. Counsel stated that that was his position.

The probate court has the authority to control the mode and order of interrogation of witnesses. See MRE 611(a). It was evident that the judge court sought to understand the relevance of the cross-examination that Patricia's counsel was pursuing. The judge asked questions that clarified counsel's position, and counsel's answers helped the judge understand the relevance of the line of questioning being pursued. The judge did not admonish Patricia's counsel or prevent him from pursuing that line of questioning further.

Patricia has not demonstrated judicial bias. The transcript shows that the probate court took steps to clarify the arguments and streamline the questioning for the sake of efficiency, which was entirely proper; further, the court allowed her to speak during her counsel's closing arguments. Consequently, Patricia has not overcome the presumption that the probate court was fair and impartial. *In re Susser Estate*, 254 Mich App at 237.

Affirmed. As the prevailing party, the Trust may tax its costs. See MCR 7.219(A).

/s/ Mark T. Boonstra
/s/ Jane E. Markey
/s/ Deborah A. Servitto